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February 5, 2008

Jeanine Townsend  
Clerk of the Board  
State Water Resources Control Board  
1001 I St., 24th Floor  
Sacramento, CA 95814

**Re: Water Quality Enforcement Workshop – 2/19/08**



Dear Ms. Townsend:

Thank you for the opportunity to comment on proposed revisions to the State Water Resources Control Board's (State Water Board) Water Quality Enforcement Policy (Policy). These comments are submitted on behalf of the Community Alliance for Responsible Environmental Stewardship (CARES), a statewide group representing the dairy industry.

CARES is an environmental coalition of California's dairy producer and processor associations, including the state's largest producer trade associations (Western United Dairymen, California Dairy Campaign and Mike Producers Council) and the largest milk processing companies and cooperatives (including California Dairies, Inc., Dairy Farmers of America-California, and Land O' Lakes). Formed in 2001, CARES is dedicated to promoting a balance of economic and environmental sustainability for California dairies. Over 1,600 existing milk cow dairies were recently placed under the Central Valley Regional Water Board's General Waste Discharge Requirements Order No. R5-2007-0035. While the dairy industry is working diligently to comply with this Order, it imposes significant new and more stringent requirements on existing milk cow dairies. CARES is therefore very interested in changes to the State and Regional Water Boards' enforcement programs.

Attached to these comments are suggested changes to the text of the January 8, 2008 Policy. The comments are keyed to the pages of the text:

1. Introduction (page 1)

The first paragraph states that "... it is the intent of the State Water Board that the Regional Water Boards operate within the framework provided by this Policy." This statement should be strengthened. The Policy was adopted as a State Policy for Water Quality Control (Calif. Water Code section 13140). As such, other state agencies, including the Regional Water Boards, shall comply with the Policy (Calif. Water Code section 13146).





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2. Formal Enforcement Actions (page 11, section IV.C.)

Formal enforcement action may only be taken by the State or Regional Water Boards themselves and their Executive Director/Executive Officer if delegated. Staff may not take formal enforcement action. This point should be stated, as there have been many instances in the past where a staff member has signed a formal enforcement action.

3. Petitions of Enforcement Actions (page 25, section IV., D.)

This short discussion of Petitions should be supplemented with information regarding precedential Orders adopted by the State Board relating to Enforcement Actions. Such information includes:

(a) The State Board does not review decisions of Regional Water Boards to refer enforcement matters to the Attorney General (State Board Order WQ 73-25).

(b) Decisions by Regional Water Boards to assess Administrative Civil Liability (ACL) will not be reviewed by the State Water Board absent a showing of an abuse of discretion. (Several Orders, including Order WQ 2001-02.)

4. Monetary Assessments in Administrative Civil Liabilities (ACLs) (pages 30-39, section VII.)

Page 31 of the Policy contains statements that defendants must demonstrate that a penalty should be less than the statutory maximum and that in many cases the statutory maximum is the appropriate penalty. These statements should be deleted since they are not consistent with the statutory scheme set forth in the Porter-Cologne Water Quality Control Act for assessing ACLs. This scheme involves a balancing of several listed factors related to the violation itself and the discharges conducted in order to arrive at an appropriate ACL. Such a balancing scheme, mandated by law, is simply contrary to the statements listed above.

5. Supplemental Environmental Projects (SEPs) (pages 41-49, section IX)

(a) Project Credit (page 42). The Policy, after citing a USEPA approach that SEPs can be credited at no more than 80% of the value of the SEP, indicates that Regional Water Boards may make similar determinations. SEPs have proven over time to be at the very heart of the ACL program. Language that can be construed as limiting their use should be revised.

(b) SEP Credit Relative to Penalty Amount (page 42). The statement that SEPs "generally should not exceed 25% of the total momentary settlement" should be deleted.





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Prior Regional Water Board enforcement actions are replete with successful settlements where the SEP amount constituted most or all of the total monetary assessment. In fact, most prior ACL settlements could not have taken place with this proposed 25% limitation. To require the Regional Water Boards to make detailed findings in support of going above this limitation will have a chilling effect on the sound discretion of the Regional Water Boards to successfully conclude cases within their jurisdiction. The 25% limit is arbitrary and requiring detailed explanations for exceeding it flies in the face of long-standing State Water Board direction not to disturb Regional Water Board ACL assessments unless there is an abuse of discretion.

(c) Addressing the State Water Board's Interest in Supplemental Environmental Projects (page 46, section IX.F.). This section should be substantially revised. As written, it will cripple the sound discretion of the Regional Water Boards to handle their own ACLs. The Porter-Cologne Act is premised on the authority of Regional Water Boards to act in their regions within a framework of statewide coordination. The statements in this section, by requiring detailed justifications of the use of SEPs that exceed 25% of the total ACL assessment, are too heavy-handed and will act as a strong deterrent to the reasonable use of SEPs in settling enforcement actions. SEPs have been a huge success; their use should be encouraged, not discouraged.

The State Water Board has the clear authority to review ACL actions on its own motion (Calif. Water Code section 13320). The language in this section, requiring Regional Water Boards to provide affirmative notification to the State Water Board or actions approving SEPs greater than 25% of an ACL, together with detailed justification, sends the wrong message. Such language will discourage the use of SEPs and greatly decrease the number of worthy settlements of ACL actions. Such discouragement is simply bad policy.

6. Orders Allowing SEPs (page 47, section IX.G.)

The text precludes the use of the ACL Complaint to propose a SEP. This is an unneeded restraint on the discretion of the Regional Water Boards. The ACL Complaint should be allowed to propose a SEP as long as the final imposition is included in an order entered under the authority of the Regional Water Board.





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Very truly yours,

A handwritten signature in dark ink, reading "Craig M. Wilson". The signature is fluid and cursive.

Craig M. Wilson

CMW:ms

cc: California Alliance for Responsible Environmental Stewardship



## INTRODUCTION

The State Water Resources Control Board (State Water Board) and the Regional Water Quality Control Boards (Regional Water Boards) (together "Water Board or Water Boards") are the principal state agencies with primary responsibility for the coordination and control of water quality. In the Porter-Cologne Water Quality Control Act (Porter-Cologne), the Legislature declared that the "state must be prepared to exercise its full power and jurisdiction to protect the quality of the waters in the state from degradation...." (California Water Code section 13000). Porter-Cologne grants the Water Boards the authority to implement and enforce the water quality laws, regulations, policies and plans to protect the groundwater and surface waters of the State. Timely and consistent enforcement of these laws is critical to the success of the water quality program and to ensure that the people of the State have clean water. It is the policy of the State Water Board that the Water Boards shall strive to be fair, firm and consistent in taking enforcement actions throughout the State, while recognizing the individual facts of each case. The primary goal of this Enforcement Policy is to create a framework for identifying and investigating instances of noncompliance, for taking enforcement actions that are appropriate in relation to the nature and severity of the violation, and for prioritizing enforcement resources to achieve maximum environmental benefits. ~~Toward that end, it is the intent of the State Water Board that the Regional Water Boards operate within the framework provided by this Policy.~~ Adopted as a State Policy for Water Quality Control (California Water Code section 13141), this Policy shall be followed by all state agencies, including the Regional Water Boards (California Water Code section 13146).

Enforcement serves many purposes. First and foremost, it assists in protecting the beneficial uses of waters of the State. Swift and firm enforcement can prevent threatened pollution from occurring and can promote prompt cleanup and correction of existing pollution problems. Enforcement ensures compliance with requirements in State Water Board and Regional Water Board regulations, plans, policies, and orders. Enforcement not only protects the public health and the environment, but also creates an "even playing field," ensuring that dischargers who comply with the law are not placed at a competitive disadvantage by those who do not. It also deters potential violators and, thus, further protects the environment. Monetary remedies, an essential component of an effective enforcement program, provide a measure of compensation for the damage that pollution causes to the environment and ensure that polluters do not gain an economic advantage from violating water quality laws.

It is important to note that enforcement of the State's water quality requirements is not solely the purview of the Water Boards and their staff. Other agencies (e.g., the California Department of Fish and Game) have the ability to enforce certain water quality provisions in state law. State law also allows for members of the public to bring enforcement matters to the attention of the Water Boards and authorizes aggrieved persons to petition the State Water Board to review most actions or in actions by the Regional Water Boards. In addition, state and federal statutes provide for public participation in the issuance of most orders, policies and water quality control plans.



### C. Formal Enforcement Actions

Formal enforcement actions are statutorily recognized actions to address a violation or threatened violation of water quality laws, regulations, policy or orders. Formal enforcement orders should contain findings of facts that establish all the statutory requirements of the specific statutory provision being cited. The actions listed below present options available for enforcement. Formal enforcement action may only be taken by the State and Regional Water Boards and their Executive Director/Officer where delegated. Staff may not take formal enforcement actions.

#### 1. Notices to Comply

Notices to Comply are issued pursuant to California Water Code section 13399 et seq., which requires the use of Notices to Comply as the only means by which the State Water Board or Regional Water Board can issue citations for minor violations. A violation is determined to be minor by the State Water Board or the Regional Water Board after considering factors defined in California Water Code sections 13399(e) and (f) and the danger the violation poses to, or the potential that the violation has for endangering human health, safety, welfare or the environment.

- (a) The violations listed below are considered to be minor violations for the purpose of compliance with California Water Code section 13399 et seq.:
  - (i) Inadvertent omissions or deficiencies in recordkeeping that do not prevent an overall compliance determination.
  - (ii) Records (including WDRs) not physically available at the time of the inspection provided the records do exist and can be produced in a timely manner.
  - (iii) Inadvertent violations of insignificant administrative provisions that do not involve a discharge of waste or a threat thereof.
  - (iv) Failure to have permits available during an inspection.
  - (v) Violations that result in an insignificant discharge of waste or a threat thereof; provided, however, there is no significant threat to human health, safety, welfare or the environment.
- (b) A violation is not considered minor if it is a priority violation as described in Section III of this Policy or includes any of the following:



#### **D. Petitions of Enforcement Actions**

Persons affected by most formal enforcement actions or failures to act by a Regional Water Board may file petitions with the State Water Board for review of such actions or failures to act. The petition must be received by the State Water Board within 30 days of the Regional Water Board action. A petition on the Regional Water Board's failure to act must be filed within 30 days of the date the Regional Water Board refuses to act or within 60 days after a request has been made to the Regional Water Board to act. Actions taken by the Executive Officer of the Regional Water Board pursuant to authority delegated by the Regional Water Board (e.g., cleanup and abatement orders, ACL orders) are considered actions by the Water Board and are also subject to the 30-day time limit. In addition, significant enforcement actions by a Regional Water Board Executive Officer may be reviewed by the Regional Water Board at the request of the discharger. When a discharger has unsuccessfully petitioned the Regional Water Board and subsequently petitions the State Water Board for review, the petition to the State Water Board must be filed within 30 days of the Executive Officer's action. The State Water Board may, at any time and on its own motion, review most actions or failures to act by a Regional Water Board. When a petition is filed with the State Water Board, the time for payment of fees, liabilities or penalties that are the subject of the petition is extended during the State Water Board review of the petition.

While most Petitions filed with the State Water Board are dismissed or otherwise resolved, many result in the adoption of precedential Orders. Some of these Orders contain important precedents relating to enforcement actions. The State Water Board will not review decisions by Regional Water Boards to refer enforcement matters to the Attorney General (State Board Order WQ 73-25). The State Water Board will not review actions to assess ACL unless there is an abuse of discretion (many Orders, including State Board Order No. WQ 2001-02).

#### **V. SPECIFIC ENFORCEMENT PROCEDURES FOR FAILURE TO PAY FEES OR LIABILITIES**

It is the intent of the State Water Board that the following specific instances of noncompliance receive consistent enforcement responses from the Water Boards. Decisions by the Water Boards to deviate from these specific recommendations should be based on extenuating circumstances that are documented in the discharger/facility record (e.g., file, databases, other records).

##### **A. Failure to Pay Annual Fees**

California Water Code section 13260 requires that each person prescribed WDRs pay an annual fee, except solid waste landfills, which are not subject to WDR fees pursuant to Public Resources Code section 48004(b). Failure to pay the fee when requested is a misdemeanor pursuant to California Water Code section 13261. All fees are due and



pursuant to California Water Code section 13399.33. Mandatory minimum penalties are discussed in Section IV.C.10 of this Policy.

~~As a general matter, where, as in the Water Code, a civil penalty structure has been devised to address environmental violations, civil penalties do not depend on proof of actual damages to the environment. Courts in reviewing similar environmental protection statutes have held that a plaintiff need not prove a loss before recovering a penalty; instead, the defendant must demonstrate that the penalty should be less than the statutory maximum. In many cases, a strong argument can be made that consideration of the statutory factors can support the statutory maximum as an appropriate penalty for water quality violations, in the absence of any other mitigating evidence. Moreover, as discussed below, the Porter Cologne Act requires that civil liabilities be set at a level that accounts for any "economic benefit or savings" violators gained through their violations. (Water Code sections 13351, 13385(e).) The Water Boards have powerful liability provisions at their disposal which the Legislature and the public expect them to fairly and consistently implement for maximum enforcement impact to address, correct, and deter water quality violations.~~

The Water Board must make several important decisions in specifying the conditions of an ACL. First, it must determine the amount of the liability after considering all of the factors in law. Next, it must consider whether the discharger should be allowed to satisfy some or all of that monetary assessment by completing or funding one or more supplemental environmental projects (SEPs). (SEPs are discussed in Section IX.) Finally, when the underlying problem that caused the violation(s) has not been corrected, the Water Board may include provisions in the ACL to encourage future work by the discharger to address problems related to the violation. The Water Board may do this in a number of ways. An ACL action may be combined with another enforcement mechanism such as a CAO, a CAO, or other order with a time schedule for obtaining compliance. An ACL action may include (as part of a settlement) additional monetary assessment, added to an amount assessed for the ACL violations, based on the cost of implementing operational measures more protective than those required by law, and/or maintaining compliance (i.e., the estimated cost of completing the specified projects). This portion of the monetary assessment (which must be sufficiently high so as to act as a disincentive to noncompliance) could be suspended pending the satisfactory completion of the specified projects. The appropriate orders to bring a discharger into compliance via an enforcement action will vary with the circumstances faced by the Water Boards. To the greatest extent possible, the Water Boards should not limit enforcement action to the assessment of monetary liability in situations where there is an outstanding or continuing violation of a requirement which impacts or threatens to impact water quality. Except where expressly provided for by law, an ACL action should not suspend penalties based on a discharger's alleged costs of coming into compliance with existing legal requirements (See Chapter X for a discussion of statutorily-authorized compliance projects).

The California Water Code requires that the determination of the amount of the liability include the consideration of a number of factors. Prior to issuing a complaint the



## 5. Project Credit

There is no requirement that a SEP be given a dollar-for-dollar credit against what would be the assessed penalty. Under certain circumstances, the Water Boards could find that the money spent on a SEP should be discounted because the value of the project is limited. ~~A similar approach is taken by USEPA where the credit that a SEP is entitled to receive could be no more than 80% of the value of the SEP unless the SEP is of outstanding quality. USEPA places this general limitation on the amount of project credit based on the fact that acceptable SEPs vary in quality in terms of the environmental benefits provided. The Water Boards may similarly determine that while a SEP meets the criteria for acceptance, its costs should not qualify for a full credit against the otherwise assessed penalty.~~

## 6. Accounting Treatment

The amount of a SEP credit will be treated as a suspended penalty. From an accounting perspective, the Water Boards will treat the credit for the SEP as a contingent receivable subject to the complete implementation of the SEP. Once the SEP is completed as required by the order, the Water Board should issue a written acknowledgement that the SEP requirements in the order have been satisfied. At that point it is no longer a contingent receivable.

Unless otherwise required by law, any order imposing a SEP shall state that, if the SEP is not fully implemented in accordance with the terms of the order and any costs of Water Board oversight, documentation, or auditing are not paid, the Water Board is entitled to recover the full amount of the suspended penalty less any amount that has been permanently suspended or excused based on the timely and successful completion of any interim milestone. Full payment of the penalty shall be in addition to any other applicable remedies for noncompliance with the terms of the order.

## 7. SEP Credit Relative to Penalty Amount

Except in certain expressly recognized circumstances, the Water Code imposes civil liability on a discharger for violations in the form of monetary payments to designated funds managed by the State Water Board (e.g., Water Code sections 13350, 13385). Therefore, the State Water Board believes that the imposition of such monetary assessments is an important component of its enforcement program for its deterrent effect on potential violations. ~~Unless otherwise required by statute, the credit permitted for a SEP generally should not exceed 25% of the total monetary assessment. This limit is consistent with the Cal/EPA Recommended Guidance on Supplemental Environmental Projects, dated October 2003. Such credit does not include any projected administrative costs incurred by the discharger that are associated with the implementation of a SEP. Only in exceptional circumstances should the value of the SEP be greater than 25% of the total monetary assessment that the discharger is required to pay (exclusive of any future administrative costs paid to a Water Board for the oversight of the implementation of a SEP).~~ In most cases, at least some portion of the penalty amount should include a monetary assessment.



## **E. Process for Project Selection**

Any public or private entity may submit a proposal to the Water Board bringing the enforcement action for a SEP that they propose to fund through this process. Staff at that Water Board should evaluate each proposal consistent with the criteria in this policy and recommend SEPs for approval by their Water Board. Each Water Board will maintain a list of approved SEPs that satisfy the general criteria. The list of approved SEPs will be made available on the Internet. When a Regional Water Board is considering allowing a discharger to perform a SEP, in lieu of payment of some portion of a civil liability assessment, the Regional Water Board should direct the discharger to the list of candidate SEPs. The discharger may select a SEP from the list of candidate SEPs, provided that the nexus requirement is satisfied, or may propose a different SEP that satisfies the general criteria for SEPs. When the discharger submits a proposal to the Regional Water Board for a SEP, it should include draft provisions (i.e., details of the specific activities that will be conducted and of the estimated budget for each activity in the SEP) for a contract to be executed between the discharger(s) who will be funding the project and the entity performing the SEP, if different from the discharger. The discharger should provide information regarding the additional selection criteria in subsection B of this section and must demonstrate to the satisfaction of the Water Board that the selected or proposed SEP also satisfies the nexus requirements in subsection C of this section.

## **F. Addressing the State Water Board's Interest in Supplemental Environmental Projects**

By statute, the funds generated by civil liabilities under the Water Code are placed into the Waste Discharge Permit Fund or the State Water Pollution Cleanup and Abatement Account (CAA), both of which are under the direction of the State Water Board (see Water Code sections 13350(k), 13385(n) and 13440 – 13443). These funds allow the State Water Board to assist Regional Water Boards and other public agencies to clean up waste or abate the effects of waste. Among the authorized uses, the CAA provides funds specifically for a regional board, upon application to the State Water Board, to pay moneys from the account to a regional board for overseeing and tracking the implementation of a SEP required as a condition of an order imposing administrative civil liability.

~~The State Water Board has a strong interest in the use of funds for SEPs that would otherwise be paid into accounts for which it has statutory responsibilities to manage and disperse. As such, the State Water Board must have the option to review SEPs which are greater than 25% of the total monetary assessment against a discharger.~~

~~If a Regional Water Board accepts a SEP that exceeds 25% of the total monetary assessment, that Regional Water Board shall affirmatively notify the State Water Board of that acceptance and the State Water Board may review the Regional Water Board's action on its own motion. The Regional Water Board shall ensure that such a SEP will~~



~~not be commenced until Regional Board advises the discharger that the State Water Board has not exercised its opportunity to review the SEP or the State Water Board has viewed the SEP and made no modifications. The notification shall be by the Regional Board to the Executive Director of the State Water Board and shall describe in detail the proposed SEP, the settlement value of the SEP, the reasons why the Regional Water Board accepted the SEP in lieu of monetary penalties, and the reasons why the SEP amount exceeds the limits on percentage set forth in this section. If the State Water Board chooses to review the settlement, it shall notify the Regional Water Board within thirty (30) days of receipt of the completed notice. The State Water Board will review the SEP after public notice pursuant to its procedures for review of Regional Water Board actions.~~

The Water Boards shall post on the Internet, by March 1 of each year, a list of the completed SEPs for the prior calendar year, and shall post information on the status of SEPs that are in progress during that period. The Water Boards are encouraged to provide information to the public on the status of SEPs on a more frequent basis.

The State Water Board retains the option of reviewing on its own motion Regional Water Board actions in which SEPs are all or part of a total monetary assessment (California Water Code section 13320).

#### **G. Orders Allowing SEPs**

~~There is no legal authority for an ACL complaint to contain a proposed SEP. SEPs are ordinarily entertained as offer to settle liability in an ACL complaint, but may also be included in the ACL Complaint. In either event, This is consistent with the original intent of SEPs and the legal justification for them. Therefore,~~ when SEPs are appropriate, they are imposed as stipulated ACL orders, in settlement of an ACL complaint or some other order entered under the authority of a Water Board.

All orders that include suspended liabilities for SEPs must:

- include or reference detailed specifications for evaluating the timely and successful completion of the SEP;
- contain or reference specific milestones, performance standards, and identified measures or indicators of performance; and
- specify that the discharger is required to meet these milestones, standards, and indicators.

Any portion of the liability that is not suspended must be paid to the CAA or other fund or account as authorized by statute. The order must state that failure to pay any required monetary assessment on a timely basis will cancel the provisions for suspended penalties for SEPs and that the suspended amounts will become immediately due and payable.